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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 80-6277

ORIGINAL COPY

ROSE HARRIS,

Relator-Appellant,

-vs-

GERALD E. FUERST, CLERK OF THE
COMMON PLEAS COURT OF CUYAHOGA COUNTY

Respondent-Appellee

MOTION TO DISMISS APPEAL

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IN THE
SUPREME COURT OF THE UNITED STATES

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ROSE HARRIS, Relator-Appellant	)	
-vs-	)	MOTION TO DISMISS
GERALD E. FUERST, Respondent-Appellee	)	

Now comes the respondent-appellee, Gerald E. Fuerst, Clerk of the Common Pleas Court of Cuyahoga County, Ohio, by and through his attorneys, John T. Corrigan, Prosecuting Attorney of Cuyahoga County, Thomas P. Gill and Patrick Carroll, Assistant Prosecuting Attorneys, and respectfully move this Honorable Court to dismiss this appeal. For the reasons stated in appellee's accompanying memorandum in support of this motion, which is incorporated herein by reference, appellee submits that this is not within the jurisdiction of the Court, as set out in 28 U.S.C. §1257(2), and therefore, the appeal should be dismissed in accordance with the provisions of Rule 16.1(b) of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

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STATEMENT OF THE CASE

This appeal arises out of an order of the Ohio Supreme Court dismissing the petition of Rose Harris, relator-appellant, for a writ of mandamus. State, ex rel. Harris, v. Fuerst, 64 Ohio St.2d 128, 413 N.E.2d 826 (1980). The appellant filed her petition for a writ of mandamus on July 22, 1980. In her petition the appellant alleged that in seeking to obtain a divorce she was unconstitutionally restricted from access to the State Court as a result of being required to pay the costs for service by publication. As the Ohio Supreme Court noted, the appellant did not attempt to obtain a waiver of the publication costs in the Domestic Relations Court. Consequently, because of the existence of an adequate remedy at law, the Court held that mandamus was not the proper remedy, and therefore, the proceeding in mandamus should be dismissed. In dismissing the mandamus proceeding the Ohio Supreme Court did not reach or in any way determine the merits of the constitutional issue which the appellant attempted to raise in her petition for the writ of mandamus.

STATEMENT OF FACTS

Relator-appellant, Rose Harris (hereinafter referred to as appellant), commenced this action by filing a petition for a writ of mandamus in the Supreme Court of Ohio on July 22, 1980. In her petition the appellant alleged that she had been a resident of Cuyahoga County, Ohio, for at least six months. According to the allegations in her petition, the appellant was married on December 26, 1962 and was abandoned by her husband in January, 1969. The appellant is currently seeking a divorce from her husband. The appellant, however, does not know the residence of her husband and has not been able to locate him.

Section 3105.06 of the Ohio Revised Code states that if the residence of a defendant in a divorce action is unknown, notice of the pendency of the action shall be given by publication as provided by the rules of procedure. Rule 4.4 of the Ohio Rules of Civil Procedure sets out the steps to be taken to perfect service by publication.

Local Rule 14 of the Rules of the Common Pleas Court of Cuyahoga County (hereinafter referred to as Local Rule _____) provides that a cost of five dollars ($5.00) must be paid with the filing of a complaint in a civil action. This five dollar cost pays for the publication of the notice and abstract of the action in the Daily Legal News. Local Rule 7 provides that a cost of thirty-five dollars ($35.00) must be paid with the clerk in those actions in which service of process is obtained by publication. This money is forwarded to the Daily Legal News to pay for the cost of publication for the six week period required by Civil Rule 4.4. The local rules of Court do not give the clerk of courts any authority to waive either of the above mentioned publication costs.

The appellant alleged in her petition that she is a welfare

recipient, receiving monthly benefits of approximately two hundred sixty-three dollars ($263.00). It was further alleged in this petition that the appellant's attorneys went to the respondent's office in January, 1980, to file the appellant's complaint for divorce. The appellant's attorneys did not tender the specified deposit to cover the cost of service by publication, as required by Local Rule 7. Rather, the appellant's attorneys attempted to waive this cost by filing an affidavit of indigency. Although the Clerk of Courts has the authority to waive all filing fees upon the filing of an affidavit of indigency, there is no authority, either by statute or Rule of Court, by which the Clerk may waive the payment of the costs for service by publication.

Prior to the filing of the petition for a writ of mandamus, the appellant had raised the same issues against the same defendant (appellee herein), by way of declaratory judgment in the Federal District Court for the Northern District of Ohio. This action was dismissed by the Trial Court and is currently pending review in the United States Court of Appeals (6th Cir.). In dismissing the declaratory judgment action the District Court held that the appellant had an adequate remedy in the state court by obtaining a waiver of the publication costs in the State Trial Court. As the District Court noted, the procedure of how such waiver could be obtained was set out in Monroe v. Monroe, 33 Ohio Mis. 23, 294 N.E.2d 250 (C.P. 1972). In addition to the adequate state remedy, the District Court also held that because the appellant did not actually attempt to file her divorce complaint, she had not been denied a right to do so, and therefore, her complaint for declaratory judgment failed to raise a justiciable case or controversy.

To date, the appellant has not attempted to obtain a waiver of the publication costs in the Domestic Relations Division of the Common Pleas Court, the Court in which the appellant's divorce action

would be determined. Rather, the appellant commenced this action in the Supreme Court of Ohio to compel the Clerk of Courts to waive the publication costs. The Ohio Supreme Court held that the appellant had an adequate remedy at law, and therefore, had failed to satisfy the requirements for the issuance of a writ of mandamus. Having failed to meet the requisite elements for a writ of mandamus, the Ohio Supreme Court dismissed the proceeding. In doing so the Court did not rule on the federal question which was raised in the appellant's petition for a writ of mandamus.

LAW AND ARGUMENT

WHEN A PROCEEDING IN MANDAMUS IS DISMISSED IN THE STATE COURT BEFORE THE FEDERAL QUESTION WAS REACHED AND THE DECISION OF THE STATE COURT WAS BASED ON AN INDEPENDENT NON-FEDERAL GROUND, THE NONPREVAILING PARTY MAY NOT INVOKE THE APPELLATE JURISDICTION OF THIS COURT PURSUANT TO 28 U.S.C. §1257(2).

The appellant attempts to invoke the appellate jurisdiction of this Court pursuant to 28 U.S.C. §1257(2); that is, that the Local Rules of Court for the Common Pleas Court of Cuyahoga County are repugnant to the Constitution. A review of the record in the lower court reflects, however, that although a federal question was raised in the appellant's petition for a writ of mandamus, the federal question was not considered by the Court. Rather, the proceeding was dismissed on the basis of an independent state issue which is adequate to support the lower Court's judgment. Consequently, appellee respectfully submits that 28 U.S.C. §1257(2) is not applicable in the present case, and therefore, this appeal should be dismissed.

A proceeding in mandamus is a special statutory procedure which is governed by Chapter 2731 of the Ohio Revised Code. In order to prevail in a proceeding in mandamus, the relator must establish that (1) she has a clear legal right to the relief sought; (2) the respondent is under a clear legal duty to perform the requested act; and (3) the relator does not have a plain and adequate remedy in the ordinary course of the law. Ohio Rev. Code §§ 2731.01, 2731.05. See also, State, ex rel. Harris v. Rhodes, 54 Ohio St.2d 41, 374 N.E.2d 641 (1978). In addition, a writ of mandamus will not lie to control judicial discretion. Ohio Rev. Code §2731.03.

With respect to the third requirement for a writ of mandamus, the record reflects and the Ohio Supreme Court noted that the appel-

lant had an adequate remedy in the ordinary course of the law by way of application to the Domestic Relations Court for a waiver for the payment of publication costs. The procedure for the waiver of such costs was set out by an Ohio Court in Monroe v. Monroe, 33 Ohio Misc. 233, 294 N.E.2d 230 (C.P. 1973). In Monroe, similar to the underlying action in the present case, the plaintiff in a divorce action alleged that she was indigent, and therefore, was unable to pay the cost for service by publication. The plaintiff in Monroe filed a motion with the trial court for a waiver of the publication costs. The trial court granted the plaintiff's motion and ordered the county to pay the publication costs.

The decision in Monroe, supra, is important for a number of reasons. To begin with, the decision sets out that the appellant has an adequate remedy at law. In the present case the appellant did not allege that she sought a waiver for the costs for service by publication by the trial court. Thus, the appellant failed to establish that this alternative remedy in the ordinary course of the law was not adequate.

In addition to the existence of an adequate remedy in the ordinary course of the law, the opinion in Monroe, supra, also illustrates that the decision to waive the costs for service by publication is one to be made by the trial court, not the Clerk of the Court. The decision in Monroe points to the fact that mere conclusionary statements contained in an affidavit of indigency may not be sufficient to show that the plaintiff is entitled to waive the publication costs. Rather, judicial inquiry into the plaintiff's ability to pay may be conducted before a decision is made whether or not to waive the publication costs. Moreover, as was stated earlier, the local rules of Court provide the Clerk of the Court with no authority by which he could order the publication costs waived. Thus, not only is the clerk of the court not under a clear affirma-

tive duty to waive the costs for service by publication for an indigent, but also, the decision to allow a waiver of such costs would fall within the bounds of judicial discretion. The decision in Monroe established that the appellant in the present case has an adequate remedy at law and that in the absence of an order of the trial court permitting a waiver of publication costs, the clerk of the court is not under a clear legal duty to allow the waiver of these costs. Therefore, on the basis of the Court's opinion in Monroe, supra, the appellant failed to establish two of the requisite elements for a writ of mandamus. In addition, as an attempt to control judicial discretion, the relief sought by the appellant was beyond the scope of the statutory limitation governing mandamus proceedings. Ohio Rev. Code §2731.03.

As was noted by the Ohio Supreme Court in its opinion dismissing the appellant's petition, prior to the initiation of the mandamus proceeding, the appellant raised the same issue in the Federal District Court by way of declaratory judgment. Rose Harris v. James A. Rhodes, et al., Case No. 80-3109 (N.D. Ohio). Appellee Fuerst was also a defendant in the Federal declaratory judgment action. This case was dismissed by the District Court on the grounds of lack of standing by the plaintiff as well as the existence of an adequate remedy in the State Court by way of judicial waiver of publication costs. Currently, the Federal action is pending in the United States Court of Appeals (6th Cir.).

The issue of whether or not the availability of a declaratory judgment action constitutes an adequate remedy at law was addressed by the Ohio Supreme Court in State, ex rel. Dollision v. Reddy, 55 Ohio St.2d 59, 378 N.E.2d 150 (1978) and State, ex rel. Bennet v. Lime, 55 Ohio St.2d 62, 378 N.E.2d 152 (1978). In both Reddy and Lime the Ohio Supreme Court stated that while the mere existence of a declaratory judgment action as an alternative remedy

is not, by itself, sufficient to permit a court to deny a petition for a writ of mandamus, the court may, in the exercise of its discretion, determine that such an alternate remedy does in fact constitute an adequate remedy at law. The primary issue, therefore, is not whether the appellant may pursue a declaratory judgment action, but rather, whether such an alternative remedy is adequate. Cf., State, ex rel. Alford v. Willoughby, 58 Ohio St.221, 231, 390 N.E.2d 782, 789 (1979).

In Lime, supra, the relators filed a petition for a writ of mandamus seeking to recover back pay as police officers while they were on active duty as members of the United States Active Reserve. The reported decision in this case reflects that two of the three relators had already commenced an action for declaratory judgment against the same parties and seeking the same relief in the Common Pleas Court. 55 Ohio St.2d at 63, 378 N.E.2d at 153. On appeal, the Ohio Supreme Court held that the appellate Court did not abuse its discretion in determining that a declaratory judgment action, which the relators had already pursued, constituted an adequate remedy at law, thereby justifying the denial of the petition for a writ of mandamus. As the Ohio Supreme Court stated in the syllabus in Lime,

> "Where parties to a mandamus action are also parties, or may be joined as parties, in a previously filed declaratory judgment action involving the same subject matter, a court, in the exercise of its discretion, may refuse to issue a writ of mandamus."

In the present case, similar to the situation in Lime, the appellant has demonstrated the adequacy of a declaratory judgment action as a remedy by commencing such an action in the Federal District Court. Thus, not only does the appellant have an adequate remedy at law by way of declaratory judgment, but also, the appellant has acknowledged this alternative means of relief as an adequate remedy by her actions

in the Federal District Court. Moreover, as the Ohio Supreme Court has stated in the past, a writ of mandamus will not be issued when there is a prior action pending between the same litigants and involving the same subject matter in another court having jurisdiction. See State, ex rel. Akron Coal Co. v. Muskingum Watershed Conservancy Dist., 136 Ohio St. 485, 26 N.E.2d 766 (1940). See also, State, ex rel. Johnson v. Industrial Comm., 144 Ohio St., 57 N.E.2d 775 (1944).

As has been shown above, the record in the present case clearly establishes that the appellant failed to satisfy the necessary requirements for the issuance of a writ of mandamus. This is not a case in which examination and determination of the federal question was precluded in the state Court as a result of the failure to timely raise the federal question. Cf., Wainwright v. Sykes, 433 U.S. 72 (1977). Rather, the appellant has failed to establish that she was entitled to the relief which she sought by way of a proceeding in mandamus. In this respect it should be noted that the appellant has not attacked the Ohio statutory scheme for obtaining a writ of mandamus or the underlying state interest in the operation of this statutory scheme. Moreover, it should be further noted that the original relief sought by the appellant (waiver of publication costs) has not been denied as a result of any procedural obstacles set out by the appellee, but rather, delayed due to the failure of the appellant to follow the instructions of both the Federal District Court and the Supreme Court of Ohio to seek a waiver of the costs for service by publication from the Domestic Relations Trial Court rather than the Clerk of the Court.

The record in the present case reflects that the Ohio Supreme Court did not reach the merits of the federal question which the appellant raised in her pleadings. Rather, the mandamus proceeding was dismissed on the grounds that the appellant's petition did not satisfy all three of the requisite elements for the

issuance of a writ of mandamus, and therefore, failed to state a claim upon which relief could be granted. Such a determination was based on a non-federal ground which was independent of the federal question and this ground was adequate to support the judgment of the State Court. Consequently, appellee respectfully submits that due to the determination of the mandamus proceeding by the Ohio Supreme Court, the appellant has failed to properly invoke the appellate jurisdiction of this Court pursuant to 28 U.S.C. §1257(2), and therefore, the appeal should be dismissed.

CONCLUSION

For the reasons stated above, appellee respectfully submits that the dismissal of the mandamus proceeding by the Ohio Supreme Court did not involve the determination of the federal question raised by the appellant, but rather, was based upon independent and adequate state grounds. Consequently, this appeal should be dismissed for lack of jurisdiction.

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APPENDIX

§ 2731.01 Mandamus defined. (GC § 12283)

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

HISTORY: GC § 12283; RS § 6741; S&C 1124; 51 v 57, § 569. Eff 10-1-53.

§ 2731.02 Courts authorized to issue writ; contents. (GC §§ 12284, 12290)

The writ of mandamus may be allowed by the supreme court, the court of appeals, or the court of common pleas and shall be issued by the clerk of the court in which the application is made. Such writ may issue on the information of the party beneficially interested.

Such writ shall contain a copy of the petition, verification, and order of allowance.

HISTORY: GC §§ 12284, 12290; RS §§ 6742, 6747; S&C 1124, 1126; 51 v 57, §§ 569, 571; 77 v 265; 82 v 16, 38; 103 v 406 (433). Eff 10-1-53.

§ 2731.03 Writ does not control judicial discretion. (GC § 12285)

The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion.

HISTORY: GC § 12285; RS § 6742; S&C 1124; 51 v 57, § 569; 77 v 265; 82 v 16, 38. Eff 10-1-53.

§ 2731.04 Application for writ. (GC § 12286)

Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit. The court may require notice of it to be given to the defendant, or grant an order to show cause why it should not be allowed, or allow the writ without notice.

HISTORY: GC § 12286; RS § 6743; S&C 1127; 51 v 57, § 573. Eff 10-1-53.

§ 2731.05 Adequacy of law remedy bar to writ. (GC § 12287)

The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law.

HISTORY: GC § 12287; RS § 6744; S&C 1126; 51 v 57, § 570. Eff 10-1-53.